

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CEMCO, LLC,

CASE NO. C23-0918JLR

Plaintiff,

## ORDER

V.

KPSI INNOVATIONS, INC., et al.,

## Defendants.

## I. INTRODUCTION

Before the court is Plaintiff CEMCO, LLC’s (“CEMCO”) motion for sanctions.

(Mot. (Dkt. # 104); Reply (Dkt. # 109).) Defendants KPSI Innovations, Inc. (“KPSI”),

Serina Klein (“Ms. Klein”), James A. Klein (“Mr. Klein”), and Kevin Klein (collectively,

“Defendants”) oppose the motion. (Resp. (Dkt. # 107).) The court has considered the

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1 parties' submissions, the relevant portions of the record, and the applicable law. Being  
 2 fully advised,<sup>1</sup> the court GRANTS in part and DENIES in part CEMCO's motion.

3 **II. BACKGROUND**

4 This case is the latest installment of a patent infringement battle between CEMCO  
 5 and one of its former employees, Mr. Klein. The court recited the parties' "thorny  
 6 history" in its October 31, 2023 order (10/31/23 Order (Dkt. ## 46 (sealed), 48  
 7 (redacted))), and therefore focuses below on the background necessary to resolve the  
 8 pending motion.

9 CEMCO initiated this lawsuit on June 16, 2023. (*See* Compl. (Dkt. # 1).) In  
 10 relevant part, CEMCO asserts claims against Defendants for induced patent infringement  
 11 pursuant to 35 U.S.C. § 271(b), alleging that Defendants "instruct and/or encourage  
 12 customers to apply FRG tape to header tracks . . . knowing that the resulting head-of-wall  
 13 assembly would infringe at least one claim in each of the [Asserted] Patents." (3rd Am.  
 14 Compl. (Dkt. # 69) ¶ 65; *see also id.* at 13-19 (alleging five counts of induced patent  
 15 infringement based on four asserted patents).)

16 CEMCO propounded its first set of requests for production ("RFPs") on October  
 17 30, 2023. (5/8/24 Trojan Decl. (Dkt. # 85) ¶ 14.) Although CEMCO followed up with  
 18 them several times, Defendants failed to respond to those RFPs until March 8, 2024,  
 19 nearly five months late. (*Id.*; *see also id.* ¶ 9, Ex. 6.) Moreover, Defendants' production  
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21 <sup>1</sup> CEMCO requests oral argument (Mot. at 1), but Defendants do not (*see* Resp. at 1).  
 22 The court concludes that oral argument would not aid in its disposition of CEMCO's motion.  
*See* Local Rules W.D. Wash. LCR 7(b)(4).

1      consisted of just 390 pages of documents. (*Id.* ¶ 15.) CEMCO propounded additional  
 2      sets of RFPs and several sets of interrogatories on March 14 and 20, 2024. (*Id.* ¶¶ 16-18.)  
 3      On April 16, 2024, KPSI responded to a set of CEMCO’s interrogatories, asserting in  
 4      relevant part that “KPSI marks its products and purchase orders with language alerting  
 5      customers to CEMCO’s patents and generally doesn’t instruct its customers as to  
 6      anything.” (*Id.* ¶ 19, Ex. 14 at 7; *see also* 8/16/23 Ms. Klein Decl. (Dkt. # 27-1) ¶ 8(b)  
 7      (“[W]e never direct or encourage customers to place the strips at head of wall.”).)  
 8      Defendants failed to timely respond to CEMCO’s second and third sets of RFPs and at  
 9      least one set of interrogatories. (5/28/24 Trojan Decl. ¶¶ 20-21.)

10        On May 5, 2024, CEMCO filed a motion to compel responses to its outstanding  
 11      requests for production and interrogatories. (*See generally* 5/8/24 Mot. (Dkt. # 84).) A  
 12      week later, CEMCO filed a motion to strike Defendants’ affirmative defenses and  
 13      counterclaims. (*See generally* 5/14/24 Mot. (Dkt. # 86).) On June 4, 2024, the court held  
 14      a virtual hearing, during which it determined that Defendants’ discovery misconduct had  
 15      jeopardized the trial date. (*See* 6/4/24 Min. Entry (Dkt. # 98).) The court moved several  
 16      dates, including the trial date and dates expert reports were due, and ordered Defendants  
 17      “to produce all responsive documents and supplement their interrogatory responses” by  
 18      June 14, 2024. (*See generally* 6/4/24 Min. Order (Dkt. # 99). *See also* 6/5/24 Sched.  
 19      Order (Dkt. # 100).) The court warned Defendants that their failure to produce all  
 20      responsive documents and supplement their interrogatory responses by June 14, 2024  
 21      would “result in severe sanctions, which may include monetary sanctions, adverse  
 22      inference instructions, and case-dispositive sanctions.” (6/4/24 Min. Order at 2.) The

1 court set the June 14, 2024 deadline to afford the parties adequate time to prepare their  
 2 expert reports, which were due on July 8, 2024. (See 6/5/24 Min. Entry (adjusting  
 3 deadline from Dkt. # 100).) The court expressly instructed Defendants “to produce every  
 4 single email and text message James Klein and any other Defendant have sent to any of  
 5 KPSI’s actual or potential customers.” (6/4/24 Min. Order at 2.) The court warned  
 6 Defendants that they “and their counsel risk inviting the ire of the court if CEMCO  
 7 identifies even a single email or text message . . . that Defendants sent to one of KPSI’s  
 8 customers and failed to produce.” (*Id.*)

9         On June 14, 2024, Defendants produced approximately 59,000 pages of  
 10 documents. (7/8/24 Trojan Decl. (Dkt. #105) ¶ 14.) Although CEMCO’s RFPs defined  
 11 “document” to include “video recordings” (5/8/24 Trojan Decl. ¶ 16, Ex. 12 at 4; *id.* ¶ 17,  
 12 Ex. 13 at 4), Defendants did not produce any videos (7/8/24 Trojan Decl. ¶ 14).  
 13 Defendants did, however, produce certain “email flyers.” (*Id.*)

14         Although Defendants produced no videos, documents in Defendants’ production  
 15 indicated that they existed. For example, Defendants produced a July 2, 2023 email from  
 16 Mr. Klein, in which he writes to a customer “[t]hese are our first attempt at training  
 17 videos [and] . . . we are setting up to make these and a bunch more . . . to use and put on  
 18 line [sic].” (*Id.* ¶ 2, Ex. 1.) Defendants also produced an October 31, 2023 email  
 19 containing “a Google Drive link, which includes . . . the videos in their entirety.” (*Id.* ¶ 4,  
 20 Ex. 2.) In response to that email, Mr. Klein “[a]ttached” his “first go at the amount of  
 21 mind numbing good information in the videos.” (*Id.*) CEMCO also discovered that  
 22 Defendants posted 30 videos on the “Safti-Seal Inc.” YouTube channel between May 24

1 and May 28, 2024. (*Id.* ¶ 12.) During his July 16, 2024 deposition, Mr. Klein testified  
 2 that he uploaded the videos to YouTube from the Google Drive. (7/29/24 Trojan Decl.  
 3 (Dkt. # 110) ¶ 3, Ex. 11 at 76:25-77:2.) CEMCO believes that approximately half of the  
 4 YouTube videos are “relevant to the FRG products or the UL Listings at issue in the  
 5 case.” (7/8/24 Trojan Decl. ¶ 12, Ex. 7.) Indeed, CEMCO identifies one video that  
 6 features Mr. Klein and a KPSI salesman “in their own words and by their own hands,  
 7 instructing customers to affix FRG intumescient strip on the sidewalls of metal tracks for  
 8 a head-of-[w]all assembly.” (Mot. at 1-2 (citing 7/8/24 Trojan Decl. ¶ 17).) CEMCO  
 9 also “found out from a contact in the industry that Defendants had emailed flyers to  
 10 customers on June 4, 2024, which [differed from the other flyers they had produced and]  
 11 contained links to the YouTube videos.” (*Id.* at 3. *See generally* 7/8/24 Trojan Decl.  
 12 ¶ 13, Ex. 8.)

13 Defendants produced the videos on June 28, 2024, after CEMCO “confronted”  
 14 them about the missing production. (7/8/24 Trojan Decl. ¶ 16.) Defendants then  
 15 conducted a supplemental document collection on July 10, 2024, explaining that  
 16 “[b]ecause KPSI is an ongoing concern and additional potentially responsive material  
 17 was likely being created on an ongoing basis.” (Resp. at 9.) Defendants did not produce  
 18 the missing email flyers until July 14, 2024—six days after the deadline for filing expert  
 19 reports. (7/22/24 Bageant Decl. (Dkt. # 108) ¶ 3.)

20 CEMCO believes that its “ability to prepare its case for induced infringement for  
 21 trial has been severely impaired beyond remediation” as a result of Defendants’  
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1 continued failure to timely produce relevant discovery. (Mot. at 14.) On July 8, 2024, it  
 2 filed the present motion, which is now ripe for review.

3 **III. ANALYSIS**

4 The court begins by providing the relevant legal standard before turning to  
 5 CEMCO's motion for sanctions.

6 **A. Legal Standard**

7 “Federal courts possess certain ‘inherent powers,’ not conferred by rule or statute,  
 8 ‘to manage their own affairs so as to achieve the orderly and expeditious disposition of  
 9 cases.’” *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 107 (2017) (quoting *Link*  
 10 *v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962)). “That authority includes ‘the ability to  
 11 fashion an appropriate sanction for conduct which abuses the judicial process.’” *Id.*  
 12 (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991)). “A district court may,  
 13 among other things, dismiss a case in its entirety, bar witnesses, exclude other evidence,  
 14 award attorneys’ fees, or assess fines.” *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075,  
 15 1088 (9th Cir. 2021); *see also Curtis v. Illumination Arts, Inc.*, No. C12-0991-JLR, 2013  
 16 WL 6173799, at \*13 (W.D. Wash. Nov. 21, 2013) (“Default judgment is available as a  
 17 sanction in appropriate cases ‘not merely to penalize those whose conduct may be  
 18 deemed to warrant such a sanction, but to deter those who might be tempted to such  
 19 conduct in the absence of such a deterrent.’” (quoting *Nat’l Hockey League v. Metro.*  
 20 *Hockey Club, Inc.*, 427 U.S. 639, 643 (1976))).

21 To impose sanctions pursuant to its inherent powers, “a district court must find  
 22 either: (1) a willful violation of a court order; or (2) bad faith.” *Am. Unites*, 985 F.3d at

1 1090. A finding of willfulness “does not require proof of mental intent . . . but rather, it is  
 2 enough that a party acted deliberately.” *Id.* Bad faith “sets a high threshold,” *Primus*  
 3 *Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997), and “requires proof  
 4 of bad intent or improper purpose,” *Am. Unites*, 985 F.3d at 1090. The “harsh sanction”  
 5 of dismissal is available if the offending party has also “engaged deliberately in deceptive  
 6 practices that undermine the integrity of judicial proceedings.” *Leon v. IDX Sys. Corp.*,  
 7 464 F.3d 951, 958 (9th Cir. 2006) (quoting *Anheuser-Busch, Inc. v. Nat. Beverage*  
 8 *Distribs.*, 69 F.3d 337, 348 (9th Cir. 1995)).

9       To determine whether the issuance of dispositive sanctions is just, the court  
 10 considers five factors: “(1) the public’s interest in expedition resolution of litigation; (2)  
 11 the court’s need to manage its dockets; (3) the risk of prejudice to the party seeking  
 12 sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the  
 13 availability of less drastic sanctions.” *Id.* (quoting *Anheuser-Busch*, 69 F.3d at 348).<sup>2</sup>  
 14 “The sub-parts of the fifth factor are whether the court has considered lesser sanctions,  
 15 whether it tried them, and whether it warned the recalcitrant party about the possibility of  
 16 case-dispositive sanctions.” *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482  
 17 F.3d 1091, 1096 (9th Cir. 2007). Case-dispositive sanctions are appropriate “where at  
 18 least four factors support . . . or where at least three factors strongly support” their  
 19 issuance. *Dreith v. Nu Image, Inc.*, 648 F.3d 779, 788 (9th Cir. 2011); *see also Payne v.*  
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21       <sup>2</sup> These are the same factors courts consider under Rule 37, and the Ninth Circuit “use[s]  
 22 cases involving dismissal under Rule 37 and inherent powers interchangeably.” *Adriana Int’l*  
*Corp. v. Lewis & Co.*, 913 F.2d 1406, 1412 n.4 (9th Cir. 1990).

1 *Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997) (“Where a court order is violated, the  
 2 first two factors support sanctions and the fourth factor cuts against a default. Therefore,  
 3 it is the third and fifth factors that are decisive.” (quoting *Adriana*, 913 F.2d at 1412)).  
 4 This five-part “test” is not meant to be mechanical but rather to “provide[] the district  
 5 court with a way to think about what to do.” *Conn. Gen. Life Ins.*, 482 F.3d at 1096.

6 **B. CEMCO’s Motion for Sanctions**

7 CEMCO argues that the court should issue case-dispositive sanctions for  
 8 Defendants’ “failure to produce critical emails and videos showing the use of FRG on  
 9 head-of-wall assemblies in violation of the Court’s June 4, 2024 Order” and award it  
 10 reasonable attorneys’ fees pursuant to 35 U.S.C. § 285. (Mot. at 3.) Defendants deny  
 11 any wrongdoing and argue that dispositive sanctions would be overly “draconian and  
 12 heavy-handed.” (Resp. at 3.) The court considers the parties’ arguments below.

13 *i. Willfulness or Bad Faith*

14 First, the court must determine whether Defendants willfully or in bad faith  
 15 violated its June 4, 2024 order. CEMCO argues that Defendants “persistently broke the  
 16 discovery rules” and then “concealed evidence . . . after being ordered to produce it.”  
 17 (Mot. at 15.) Defendants respond that “KPSI did not ‘willfully’ withhold any  
 18 discoverable information because it did not withhold any information at all.” (Resp. at  
 19 7.)

20 The court has little difficulty concluding that Defendants willfully and in bad faith  
 21 violated its June 4, 2024 order and did so in a deliberate attempt to withhold damaging  
 22 evidence. The court ordered Defendants “to produce ***all responsive documents*** . . . by

1 June 14, 2024.” (6/4/24 Min. Order at 2 (emphasis added).) Defendants, however, did  
2 not do so. Defendants posted the videos on YouTube between May 24 and 28, 2024.  
3 (7/8/24 Trojan Decl. ¶ 12, Ex. 7.) Although Defendants acknowledge that the videos are  
4 “relevant” (Resp. at 1), they did not produce them by June 14, 2024. Defendants also did  
5 not produce the email flyers even though they sent them out the same day the court issued  
6 its minute order instructing Defendants to produce all relevant discovery. Defendants  
7 argue that “material created between May 22, 2024, and June 14, 2024, was not included  
8 . . . because it was newly generated” (Resp. at 7), but there are three issues with that  
9 argument. First, the court ordered Defendants to produce “all responsive documents” and  
10 did not allow for an arbitrary cutoff window. (6/4/24 Min. Order at 2.) Second, the  
11 videos were in the works as of July and October 2023, so at least some of the footage was  
12 not “newly generated.” (See 7/8/24 Trojan Decl. ¶ 2, Ex. 1). And third, Defendants  
13 produced sales information through June 13, 2024 (7/29/24 Trojan Decl. ¶ 2), meaning  
14 they selectively produced some, but not all, “newly generated” responsive documents.  
15 Defendants also argue that they produced “correspondence about the Videos, and links to  
16 the Videos” (Resp. at 7), but a breadcrumb trail is no substitute for actual document  
17 production. Simply put, Defendants withheld videos that show Mr. Klein installing FRG  
18 tape on header tracks—evidence that KPSI’s interrogatory response that it “generally  
19 doesn’t instruct its customers as to anything” was untruthful and that Ms. Klein perjured  
20 herself in declaring that “[w]e never direct or encourage customers to place the strips at  
21 head of wall.” (5/8/24 Trojan Decl. ¶ 19, Ex. 14 at 7; 8/16/23 Ms. Klein Decl. ¶ 8(b).)  
22 Defendants willfully and in bad faith violated the court’s June 4, 2024 order by not

1 producing the videos and email flyers, and their conduct has undermined the integrity of  
2 these proceedings.

3                   *ii. Five-Factor Test*

4                   Next, the court must weigh the relevant factors to determine whether dispositive  
5 sanctions would be just. CEMCO argues that the relevant factors, particularly prejudice,  
6 weigh in favor of dispositive sanctions. (Mot. at 13.) Defendants respond that CEMCO  
7 has not been prejudiced and that the factors do not support dispositive sanctions. (Resp.  
8 at 9.) Although the court concludes that dispositive sanctions are warranted as to some  
9 issues, the court does not agree with CEMCO that Defendants' misconduct warrants  
10 disposition of the entire case.

11                   From the outset, the court concludes that the first two factors, the public's interest  
12 in expeditious resolution of litigation and the court's need to manage its docket, strongly  
13 support the issuance of dispositive sanctions. *See Payne*, 121 F.3d at 507. Defendants'  
14 misconduct and disregard for the discovery rules have already delayed this matter, and  
15 Defendants willfully disobeyed the court's June 4, 2024 order, which set a strict  
16 production deadline to get this case back on track. However, the fourth factor—the  
17 policy favoring resolution of cases on their merits—"always weighs against dismissal."  
18 *Dreith*, 648 F.3d at 788. Thus, as CEMCO acknowledges, the "key factors . . . are  
19 prejudice and the availability of lesser sanctions." (Mot. at 13.)

20                   The court concludes that CEMCO has been severely prejudiced by Defendants'  
21 extensive discovery misconduct stretching back to late 2023. A party suffers prejudice if  
22 its adversary's misconduct has impaired its "ability to prove the claims" or "threaten[ed]

1 to interfere with the rightful decision of the case.” *Wanderer v. Johnston*, 910 F.2d 652,  
 2 656 (9th Cir. 1990). “Failure to produce documents as ordered . . . is considered  
 3 sufficient prejudice.” *Adriana*, 913 F.2d at 1412 (holding that a party’s “repeated failure”  
 4 to appear at depositions “compounded by their continuing refusal to comply with  
 5 court-ordered production of documents constitutes an interference with the rightful  
 6 decision of the case”). Defendants have both impaired CEMCO’s ability to prove its  
 7 claims and interfered with the “rightful decision” of this case by stonewalling CEMCO  
 8 throughout nearly the entire discovery period, violating the discovery rules and this  
 9 court’s June 4, 2024 order along the way. In particular, the court agrees with CEMCO  
 10 that Defendants’ actions have hampered its ability to conduct third-party discovery. This  
 11 is especially concerning given Mr. Klein’s recent deposition testimony that KPSI sent the  
 12 email flyers to “6,000 . . . [a]rchitects, contractors, inspectors, [and] fire stoppers.”  
 13 (7/29/24 Trojan Decl. ¶ 3, Ex. 11 at 46:21-23.) Given this history, the court cannot help  
 14 but anticipate continued misconduct from Defendants.

15 The court further concludes that nothing short of a default against Defendants  
 16 would remedy the prejudice CEMCO has suffered, adequately punish Defendants, and  
 17 serve to deter others from engaging in similar egregious behavior. Although the court  
 18 has not yet sanctioned Defendants (in this case, at least),<sup>3</sup> the court warned Defendants of  
 19 the risk of case-dispositive sanctions in its June 4, 2024 order. (6/4/24 Min. Order at 2.)

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21 <sup>3</sup> See Order at 22-23, *Cal. Expanded Metal Prods. Co. v. Klein*, No. C18-0659JLR (W.D.  
 22 Wash. Nov. 21, 2023), Dkt. # 377 (holding Mr. Klein personally liable for over \$1 million in  
 fees and costs as a compensatory civil contempt sanction).

1 CEMCO's request that the court dispose of the entire case, however, goes beyond what is  
2 necessary to remedy the present injustice and punish Defendants. (See Prop. Order (Dkt.  
3 # 104-1).) Because Defendants' misconduct has primarily impacted CEMCO's ability to  
4 prove induced patent infringement, the court concludes that the appropriate sanction is as  
5 follows: (1) the court will enter default against Defendants with respect to CEMCO's  
6 claims for induced patent infringement; (2) the court will strike all of Defendants'  
7 affirmative defenses except numbers 10 and 11, which concern validity; and (3) the court  
8 will strike Defendants' counterclaims to the extent that Defendants seek "declaratory  
9 judgment of non-infringement" (Answer (Dkt. # 83) at 11) but not to the extent that  
10 Defendants seek declaratory judgment of invalidity. These sanctions have no impact on  
11 CEMCO's claims concerning the alleged fraudulent transfer of assets.

12 **IV. CONCLUSION**

13 For the foregoing reasons, the court GRANTS in part CEMCO's motion for  
14 sanctions (Dkt. # 104). The court (1) ENTERS DEFAULT against Defendants with  
15 respect to CEMCO's claims for induced patent infringement in violation of 35 U.S.C.  
16 § 271(b); (2) STRIKES Defendants' affirmative defenses except for numbers 10 and 11  
17 concerning validity; and (3) STRIKES Defendants' counterclaims to the extent that they  
18 seek declaratory judgment of non-infringement. The court DENIES CEMCO's request  
19 for attorneys' fees under 35 U.S.C. § 285 without prejudice to refiling the request at a  
20 later time should CEMCO prevail on validity. The court will, however, GRANT  
21 CEMCO the reasonable attorneys' fees and costs it incurred in drafting the present

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1 motion and reply brief. CEMCO must file its motion for attorneys' fees and costs by no  
2 later than **August 27, 2024**.

3 Dated this 13th day of August, 2024.

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5 JAMES L. ROBART  
6 United States District Judge  
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